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Supreme Court, U.S.
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No. 01-1229

In The

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

AMICUS BRIEF OF LAW PROFESSORS LYNN A. BAKER AND MITCHELL N. BERMAN IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *amici curiae* Law Professors Lynn A. Baker and Mitchell N. Berman move for leave to file the accompanying brief *amici curiae*.

Due to a lack of time, *amici curiae* did not seek formal consent to the filing of this brief from the parties, although counsel for Respondents, Salvador A. Mungia, has given verbal consent to the filing of this brief *amici curiae*.

Because of *amici curiae*'s extensive scholarly study of several areas of constitutional law at issue in this case, including the nature of the federal-state balance and the proper scope of Congress's power under the Spending Clause and Commerce Clause of Article I of our Constitution, *amici curiae* are able to provide the Court a useful perspective on these issues.

Amici curiae respectfully request that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

This amicus brief is filed on behalf of Respondents and submitted by law professors Lynn A. Baker and Mitchell N. Berman ("Law Professors").

We are both tenured professors at the University of Texas School of Law in Austin, Texas, who teach and write on constitutional law.

More particularly, we have each devoted a substantial portion of our scholarly work to study of the spending power, particularly conditional federal spending, and federalism. Our publications in this area include:

- Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911 (1995)
- Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. UNIV. L. REV. 923 (1997)
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As law professors, our interest in this case is straightforward: to encourage the law of this nation to evolve in a desirable way, and to contribute our expertise to this Court's important role in that process.

We received no compensation for, and anticipate no financial gain from, writing this brief.[1] Further, we speak only for ourselves. The views expressed herein do not constitute the opinions of the State of Texas, the University of Texas, or the University of Texas School of Law.

SUMMARY OF ARGUMENT

In *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 2001), the Washington Supreme Court held that a condition on Congress's offer to the states of certain federal funds exceeded Congress' Article I powers, including its powers under the Spending Clause and the Commerce Clause. We agree with the Court's holding, but offer a somewhat different analysis.

[1] In compliance with Rule 37.6, Law Professors state that this brief was not written in whole or in part by counsel for a party, and no person or entity other than Law Professors made a monetary contribution to the preparation or submission of this brief.

The condition at issue, 23 U.S.C. § 409, violates at least two of the requirements set out by this Court in *South Dakota v. Dole*, 483 U.S. 203 (1987), for constitutionally permissible conditions on federal funds: the "clear notice" requirement and the "relatedness" requirement. We identify four significant ambiguities in the text of § 409, and note the extensive disagreement among the national judiciary as to the intended meaning and scope of the provision. We conclude that § 409 cannot plausibly be described as "unambiguous[]," as required by *Dole*, 483 U.S. at 207.

Moreover, although in many contexts the Court has the obligation to construe an ambiguous statute to avoid a potentially unconstitutional construction, the mere existence of such an ambiguity in a conditional offer of federal funds is fatal under *Dole*, *id.*; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999).

Section 409 also fails *Dole*'s "relatedness" requirement. The federal interest to be served by the federal funds on which § 409 is a condition on receipt is increasing highway safety. Because the § 409 privilege extends to documents and data that would have existed and would not have been privileged in the absence of the federal funding scheme, it diminishes the ability of individuals to successfully sue the state and localities for hazardous road conditions, relative to the state of affairs that would exist if the § 409 privilege did not extend so far. At the same time, extending the privilege this far provides no countervailing increase in highway safety. The net result – a certain decrease in highway safety – is obviously antithetical to the federal interest in increased highway safety at the center of the federal funding scheme of which § 409 is a part.

We contend that § 409, under which Congress seeks to regulate the rules of evidence to be applied in state court

civil proceedings involving causes of action brought solely under state law, also exceeds Congress's power under the Commerce Clause. In order to uphold § 409 under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), it would be necessary for this Court to find that all civil litigation in state court involving causes of action brought solely under state law is "economic activity" that "substantially affects interstate commerce," *Lopez*, 514 U.S. at 560; *Morrison*, 529 U.S. at 611. Such a finding is implausible, and would in any case require this Court to authorize pervasive congressional regulation of an area in which the states historically have been sovereign.

Finally, we argue that § 409 is an unconstitutional intrusion upon state sovereignty, insofar as it obscures political responsibility at the expense of individuals' rights under state law.

ARGUMENT

The relevant facts, for purposes of the questions addressed herein, are these. Motorists involved in traffic accidents sought access to accident reports and other materials and data held by local governments related to the traffic history of the sites of their accidents in connection with tort actions alleging negligence by the governments in their maintenance of the intersections at which the accidents occurred. The governments refused to disclose the requested information in reliance in part on a federal statute, 23 U.S.C. § 409, as amended in 1995, which states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Because the accident reports and other materials that the plaintiffs sought had been collected by the relevant local governments as part of an application to the state of Washington for federal hazard elimination funds under 23 U.S.C. § 152, *Guillen*, 31 P.3d at 632-33, the local governments argued that they were privileged under § 409, as amended. The question for the Washington Supreme Court was whether the collecting of certain reports and other materials for this statutorily specified purpose rendered them privileged even if those reports and other materials had been compiled for other purposes, such as routine law enforcement, *id.* at 644-46.

To understand the import of the question, consider the following example. A local police officer prepares (compiles) an accident report as he is required to do under longstanding state law. At a later point in time, that report is collected by a state authority pursuant to 23 U.S.C. § 152 in order for the state to determine the ten intersections in the state where safety improvements are most needed. The state authority prepares a report discussing those ten intersections which it uses to set its priorities for spending its annual allotment of federal highway safety funds. Plainly, the report prepared by the state pursuant to § 152 would be covered by the § 409 privilege. The question before the state court, however, was whether the original accident reports – reports that (by hypothesis) would have

been prepared even in the absence of the federal scheme, and which were not *compiled* pursuant to § 152 – would *also* be covered by the privilege once they were *collected* pursuant to § 152 in order to generate the report of highway safety priorities.

The Washington Supreme Court held that they were. *Id.* at 646. Under the statute's plain language, it reasoned, materials or data that have been "collected" for a statutorily specified purpose are covered by § 409, as amended. *Id.* Whether the materials or data had been originally compiled for distinct purposes appears irrelevant. *Id.* Moreover, the history of the evolution of § 409 bolstered this interpretation. When initially enacted in 1987, that section did not contain the words "or collected." Accordingly, the Court observed, "most state courts restricted the application of the federal privilege" to materials and data "that had been specifically created for the purpose of applying for federal safety improvement funding of implementing a funded project." *Id.* at 641. Congress amended § 409 in 1995 by adding the words "or collected" after "compiled" specifically in response to these narrow decisions and in order to "clarify" the intended scope of the privilege. H.R. Rep. 104-246 § 328, at 59 (1995); *see* Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591. And Congress described the privilege's scope as follows:

> It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.

Id. For these reasons, the Washington Supreme Court agreed with Pierce County that any reports or data

collected for the statutorily specified purposes became fully privileged. *Guillen*, 31 P.3d at 644.

But Pierce County's victory on the question of the scope of the privilege afforded by § 409, as amended, quickly turned Pyrrhic. For the Washington Supreme Court proceeded to hold that when construed so broadly the § 409 privilege violated *Dole's* relatedness requirement:

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," for, [sic] among other reasons, pursuant to a federal statute for federal purposes.

Guillen, 31 P.3d at 651 (emphasis in original omitted). The Court therefore held § 409, as amended, to exceed Congress's spending power. In addition, the Court concluded that Congress's enactment of § 409, as amended, was not authorized by the Commerce Clause or the Necessary and Proper Clause, and was an unconstitutional violation of state sovereignty.

Three justices of the Washington Supreme Court disagreed with the majority's interpretation of § 409, as amended. As Justices Madsen and Johnson and Chief Justice Alexander read the privilege, an individual report originally compiled for an ordinary state or local law enforcement purpose was not covered by § 409 merely because it was later collected, along with other reports or data, for the purpose of applying for a share of the state's federal safety-improvement funds. *Guillen*, 31 P.3d at 657 (Madsen, J., concurring). All that the 1995 amendment clarified, in the view of the concurring justices, was that if

these reports were subsequently "collected" pursuant to § 152 or another specified provision of federal law, the *collection* of reports would not itself be discoverable. *Id.* at 658.

In other words, as the concurring justices read the legislative history, in amending § 409 in 1995 Congress was reacting against judicial decisions that permitted plaintiffs "to gain information that was 'collected' by an agency for the purpose of preparing an application for federal funding from the agency that 'collected' the information." *Id.* at 657. By adding "or collected" to "compiled," under this view, Congress simply wanted to ensure that a plaintiff could not exploit the state's action of collecting reports to save it from doing its own work in litigation against the state or any of its political subdivisions. *Id.* It would not follow, the Concurrence concluded, that plaintiffs should be handicapped when "seeking information or reports from their original source, such as accident reports from a law enforcement agency." *Id.*

I. 23 U.S.C. § 409, as amended, exceeds Congress's Article I spending power

In *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), this Court held that the spending power is "subject to several general restrictions." Section 409 of Title 23 violates at least two of the requirements set out in *Dole* for constitutionally permissible conditions on federal funds: the "clear notice" requirement and the "relatedness" requirement.

A. 23 U.S.C. § 409, as amended, is not unambiguous

In *Dole*, this Court held that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their

participation.'" 483 U.S. at 207, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The reason for this requirement is straightforward: "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. "The legitimacy of Congress's power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the 'contract'." *Id.*

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must . . . . speak with a clear voice . . . .

Id.

The text of 23 U.S.C. § 409, as amended, contains at least four significant ambiguities of the sort that have precluded States and their political subdivisions from knowing with any certainty the terms of their "contract" with the federal government. In the recent words of one federal district court, "Section 409 has engendered some confusion in the courts, thanks to its unwieldy language and the absence of any significant legislative history," *Powers v. CSX Transportation, Inc.*, 177 F. Supp.2d 1276, 1277 (S.D. Ala. 2001). Recall that, as amended, 23 U.S.C. § 409 states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data *compiled or collected* for *the purpose* of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be

> implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence *in a Federal or State court proceeding or considered for other purposes in any action for damages* arising from any occurrence at a location *mentioned or addressed* in such reports, surveys, schedules, lists, or data.

(emphases added).

The first ambiguity is the one that divided the Washington Supreme Court, as described above: if a report, survey, or any other specified item is originally compiled for purposes entirely unrelated to a federally funded highway-safety improvement project, does the report itself and the data contained therein become privileged simply because it has been subsequently collected for purposes of such a federally funded project? That is, can a local government shield from discovery and introduction into evidence all pre-existing, highway-related reports and data simply by collecting them for the purposes specified in § 409, as amended?

The language of § 409, as amended, seems strongly to support an affirmative answer. But the concurring justices' reading is also arguably consistent with the text of § 409, as amended. As even the majority of the Washington Supreme Court acknowledged,

> state courts have *understandably* remained reluctant to *construe* § 409 in a manner that creates a legal black hole into which state and local governments can drop virtually all accident materials and facts, simply by showing that such materials and 'raw data' are also 'collected' and used to identify and rank candidates for federal safety improvement projects statewide.

Guillen, 31 P.3d at 644 (emphases added).

Furthermore, as the *Guillen* concurrence explained, its narrower reading of the § 409 privilege would not

render the 1995 amendment pointless. Some state courts had held prior to 1995 that data collected by one state agency for a purpose specified in § 409 were discoverable *even from that collecting agency* so long as they had originally been compiled by other agencies for purposes not mentioned in § 409. On the reading favored by the *Guillen* concurrence, the 1995 amendment made clear that this was wrong. Thus, the amendment serves a function even if it does not establish, as the *Guillen* majority held, that the subsequent collecting of the data made the data undiscoverable even in their original form from the agencies that had initially compiled them. This is not a merely formalistic distinction, for plaintiffs' attorneys would find their jobs much easier if they could piggyback on a single government agency's efforts to identify and assemble relevant data or reports compiled by several other governmental entities. In the end, if the *Guillen* concurrence's favored reading of the § 409 condition on federal funds is a textually permissible one, the condition is ambiguous and must fall under *Dole*.

The practical significance of this textual ambiguity is evidenced by the fact that the sixteen courts, including the Washington Supreme Court, that have discussed this aspect of the provision in applying § 409, as amended, have been divided in their interpretations. Ten courts have interpreted this aspect of § 409, as amended, broadly as the *Guillen* majority did. *See Powers v. CSX Transportation*, 177 F. Supp.2d 1276, 1280 (S.D. Ala. 2001); *National Railroad Passenger Corp. v. Transwood, Inc.*, 2001 WL 986868 *1, *2 (E.D. La. 2001); *Isbell v. Arizona*, 9 P.3d 322, 324 (Ariz. 2000) (en banc); *Dowell v. Louisiana*, 750 So.2d 498, 501 (La. App. 2000); *Sevario v. Louisiana*, 752 So.2d 221, 230 (La. App. 1999); *Palacios v. Louisiana & Delta R.R., Inc.*, 740 So.2d 95, 101-02 (La. 1999); *Coniker v. New York*, 695 N.Y.S.2d 492, 495, 496 (N.Y. Ct. Claims 1999); *Fry v. Southern Pacific Trans. Co.*, 715 So.2d 632, 637 (La.

App. 1998); *Hardenstein v. Cook Construction*, 691 So.2d 177, 182 (La. App. 1997); *Reichert v. Louisiana*, 694 So.2d 193, 200 (La. 1997). Meanwhile, five courts have read the text more narrowly, essentially as the *Guillen* concurrence did. *See Werner v. IA Construction Corp.*, 51 Pa. D. & C. 4th 509, 513 (2001); *Irion v. Louisiana*, 760 So.2d 1220, 1226 (La. App. 2000); *Guillen v. Pierce County*, 982 P.2d 123, 129 (Wash. App. 1999); *Ex parte Alabama Dep't of Trans.*, 757 So.2d 371, 374 (Ala. 1999); *Palacios v. Louisiana & Delta R.R., Inc.*, 682 So.2d 806, 810 (La. App. 1997).

A second respect in which § 409, as amended, is ambiguous is closely related to, yet analytically distinct from, the first. Suppose now that a report is *simultaneously* created for various purposes, only one of which involves planning for federally funded highway-safety improvements. Say, for example, that a municipality conducts a survey of road usage patterns at a particular intersection for two reasons: to design a routing plan for its public transportation system, and to assess the safety of the intersection for purposes of a federally funded highway-safety improvement project. Is the survey privileged under § 409, as amended?

It is difficult to know. Is a survey "compiled or collected for the purpose of" planning or developing federally funded highway-safety improvements when that is merely *a* purpose, but not *the sole* purpose for which the survey is created? Does it matter whether the statutorily specified purpose is not even a *but-for* purpose for the survey's creation? The text of § 409, as amended, does not resolve this mixed-motive problem, and on its face can support either the privileging or the admissibility of the survey.

The third major textual ambiguity in § 409, as amended, concerns the proceedings to which the privilege applies. Suppose a defendant on trial for vehicular homicide seeks to introduce data related to the accident history

at the location of the accident to support his contention that he was guilty, at most, of ordinary civil negligence. Are the data admissible if they have been collected for the statutorily specified purpose? In other words, does the privilege apply only to Federal or State court proceedings for damages, or does it apply even to Federal or State court criminal proceedings and civil actions seeking injunctive relief?

Again, the text of § 409, as amended, provides little guidance. In relevant part, § 409 states that the covered documents and data

> shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Clearly, the data would not be privileged in our hypothetical case had Congress included commas in § 409 as follows: " . . . a Federal or State court proceeding, or considered for other purposes in any action, for damages arising from. . . . " The opposite interpretation would seem clear if Congress had instead inserted commas as follows: " . . . a Federal or State court proceeding, or considered for other purposes in any action for damages, arising from. . . . "

Unfortunately, Congress neglected to include any commas at all in this portion of the text of § 409, both as amended in 1995 and as originally enacted in 1987. So neither of these two interpretations is clearly inconsistent with, or mandated by, the text of the provision.

The fourth noteworthy textual ambiguity in § 409, as amended, is in the final clause of the provision: " . . . any action for damages arising from any occurrence at a location mentioned or addressed in such data." Consider a

hypothetical report prepared pursuant to the federal scheme that lists and describes only the ten locations determined by the state to be most in need of safety improvements. Imagine further that this list was arrived at after an analysis of the locations of all traffic accidents that occurred during the preceding twelve months.

What is the status of a location at which at least one accident occurred during the preceding twelve months and that was therefore a part of the data analysis that was necessary for the creation of the state's "worst ten" list? Is such a location "mentioned or addressed in such data"? What is the status of a location at which no accident occurred during the preceding twelve months and which therefore arguably was not even included in the data analysis that resulted in the "worst ten" list? Is such a location "mentioned or addressed in such data"? Again, the text of § 409, as amended, permits either reading.

Given the above four facially apparent and significant ambiguities in the text of § 409, as amended, as well as the extensive disagreement among the nation's judiciary as to the intended meaning and scope of the provision, this condition on federal funds cannot plausibly be described as "unambiguous[]," as required by *Dole*, 483 U.S. at 207. Because Congress has not spoken "with a clear voice" in § 409, as amended, the States are not able "to exercise their choice knowingly, cognizant of the consequences of their participation," *Dole*, 483 U.S. at 207. Thus, under *Dole*, § 409, as amended, must be found to exceed Congress's Article I spending power.

In many contexts, this Court has the option – indeed the self-imposed obligation – to construe an ambiguous statute to avoid a "constitutionally doubtful" construction where possible. *See, e.g., Jones v. United States*, 529 U.S. 848, 851, 857 (2000); *Edward J. DeBartolo Corp. v. Flordia Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

Under this Court's spending power doctrine as set forth in *Dole*, however, the mere existence of the ambiguity is constitutionally determinative – and fatal. This is not only because such legislation is "in the nature of a contract," *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999); *see also id.* at 655 (Kennedy, J., dissenting), but also because "the clear-notice safeguard of our Spending Clause jurisprudence" is a "vital safeguard for the federal balance," *id.* As Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, recently wrote in their dissent in *Davis*, "Only if states receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power," *id.*

Given its various textual ambiguities as well as the extensive disagreement as to its meaning and scope among the many judges across the nation who have studied § 409, as amended, it would seem extraordinary for this Court now to conclude that the provision complies with *Dole*'s clear-notice requirement.

B. 23 U.S.C. § 409, as amended, is "unrelated 'to the federal interest in particular national projects or programs'"

If this Court were somehow to conclude that § 409, as amended, satisfies *Dole*'s clear-notice requirement, we can only guess as to which interpretations this Court would be more likely to adopt with respect to what we have identified above as the second, third, and fourth ambiguities in the text of § 409. We think it clear, however, that this Court cannot hold § 409, as amended, unambiguous in its entirety without endorsing the broad interpretation of the

first putative ambiguity adopted by the Washington Supreme Court and two-thirds of the other courts to take up the issue. As we explained in (A) above, it simply strains credulity to conclude that the narrower interpretation – adopted only by the concurring justices in *Guillen* and by a small minority of courts to discuss the issue – *is not merely the better interpretation of § 409, as amended, but the unambiguously correct one*. Revealingly, not even the concurring justices in *Guillen* made so strong a claim. Rather, they stated only that "the 1995 amendment *can be logically read*" in the narrower fashion they favored, *Guillen*, 31 P.3d at 657 (M dsen, J., concurring) (emphasis added).

We shall therefore assume *arguendo* that this Court holds that § 409, as amended, is not impermissibly unambiguous and that the privilege applies even to documents or data that were not compiled for a statutorily specified purpose so long as the document or datum is at some subsequent point "compiled or collected" pursuant to the federal scheme. If this is what § 409, as amended, means, however, we believe that this Court must agree with the Washington Supreme Court that the condition fails *Dole*'s "relatedness" requirement.

Dole's spending power doctrine requires that conditions on federal grants not be "unrelated 'to the federal interest in particular national projects or programs'," 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). In *Dole*, the majority stated that it had not yet been necessary for the Court to "define the outer bounds of [this] 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power," 483 U.S. at 209 n.3. The *Dole* Court elaborated on this requirement only insofar as it quoted with approval the Court's 1958 statement that "the Federal Government may establish and impose reasonable conditions relevant to federal interests in the project and

to the overall objectives thereof," *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958).

More recently, the Court has described this requirement as mandating only that conditions on the receipt of federal funds "bear *some relationship* to the purpose of the federal spending," *New York v. United States*, 505 U.S. 144, 167 (1992) (emphasis added), "otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority," *id.*

The federal interest to be served by the federal funds on which § 409, as amended, is a condition on receipt is clear: increasing highway safety. "Section 409 forms part of a comprehensive federal plan to promote highway . . . safety," *Dowell v. Louisiana*, 750 So.2d 498, 500 (La. App. 2000). Section 409 is a subsection of Chapter 4 of Title 23, which is titled "Highway Safety," and Chapter 4 originated as the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966). The core provision of Chapter 4 is § 402, which requires each state to establish a "highway safety program" that is "designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom."

Thus, in order to withstand scrutiny under existing doctrine, § 409, as amended, must "bear some relationship to," *Dole*, 483 U.S. at 207, or not be "unrelated to," *New York*, 505 U.S. at 167, increasing highway safety. In fact, however, § 409, if construed as the Washington Supreme Court majority construed it, is logically at odds with the federal interest in increasing highway safety.

There is no evidence – neither prior to 1987, when § 409 was originally adopted, nor prior to 1995, when it was amended – that Congress or the Secretary of Transportation withheld any portion of a state's allotment of federal highway safety funds for non-compliance with § 152 or any of the other provisions of federal law specified

in § 409. Thus, we are left to assume that all of the states were receiving the federal funds and spending them on projects reasonably expected to increase highway safety. Given this state of affairs, the privilege afforded by § 409 was not needed to increase highway safety by increasing state participation in the federal highway safety scheme since there was already apparently 100% participation. It is possible, however, that the privilege afforded by § 409 would increase the willingness of localities within each state to provide the state the data necessary for the state to spend its annual allotment of federal highway safety funds more efficiently.

Absent federal highway funding, state and local governments can be presumed to have two principal incentives for improving the safety of their own roads. The first is the interest in protecting their citizens from all the physical and economic harms associated with vehicular accidents. The second, for entities that do not enjoy or have waived sovereign immunity, is the fear of being held liable in tort for any negligence that might be found causally responsible for the accidents. Of course, resources being limited, states and localities likely could not make all the safety improvements they might desire. Nonetheless, these considerations would generally be adequate to incentivize state and local governments to investigate how to prioritize safety needs most efficiently.

To understand how those pre-existing incentives affect a locality's interest in receiving Federal funding for road safety improvements, consider § 152 to which § 409, as amended, explicitly applies. Under § 152(a), as it read in 1995 when the amendment to § 409 was adopted, states are obligated to identify "high-hazard" highway locations and, *inter alia*, "assign priorities for the correction of such locations." A specified total amount of federal monies is appropriated each year for the states' hazard-elimination projects. *Id.* § 152(e). Pursuant to § 152(e), these federal

funds are to be apportioned among the participating states substantially in proportion to the population of each state, *id.* § 402(c). Within each state, its share of the total appropriation of federal funds is to be spent on hazard-elimination projects of the state's choosing, with the federal monies covering 90 percent of a selected project's cost. *Id.* § 152(d). Thus, the only competition for federal highway-hazard-elimination funds would occur within each state, with each state the judge of that internal competition for its share of federal funds. Because a successful application for a share of the state's allotment of federal funds would enable a locality to improve the safety of its highways at least in part with federal dollars, localities would have a good reason to participate aggressively.

There is a countervailing consideration, however. Without a privilege for the efforts undertaken for the purpose of trying to secure a share of the state's allotment of federal funds, the fear of increased tort liability might threaten to take away what the carrot of federal funds provided. That is, a locality might decide not to undertake the efforts necessary to develop a potentially successful funding proposal out of concern that doing so would build a record that would make it more susceptible to successful negligence suits if its application for highway-safety funds were not approved and the proposed safety improvement therefore not made. *See, e.g., Rodenbeck v. Norfolk & W. Ry.*, 982 F. Supp. 620, 624 (N.D. Ind. 1997) (observing that if a government "knows that its candid efforts at persuasion" to secure federal safety-enhancement funds "may ultimately be used against it, [that government] will be far less forthcoming in offering any 'data' by which that discretion can be exercised, and indeed may choose not to offer safety suggestions at all").

Conditioning federal funding for projects on the nondiscoverability and inadmissibility of any work product

created "for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing . . . or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds," 23 U.S.C. § 409, thus plausibly promotes highway safety by eliminating one consideration that might deter local governments from competing vigorously for their state's allotment of federal dollars. Of course, the state would still spend its total allotment of federal highway-safety funds on road-safety improvement projects even if some localities sat out the competition or participated only half-heartedly. But the state would presumably spend its allotment of funds less efficiently, buying a smaller overall increase in safety, than if all localities put forth their best efforts at identifying the most dangerous locations.

Put another way, § 409 would provide the political subdivisions of the states an incentive – if a state were simply unwilling to impose, or unable successfully to enforce, a state-wide mandate to this effect – to gather and provide the state the information it might need to increase the likelihood that the state's allotment of federal highway safety funds was spent in the most effective possible way. This would *perhaps* yield a greater increase in highway safety than would have been obtained if the same funds were spent on different safety-improvement projects. To the extent that § 409, as amended, extends a privilege to documents created in order to help the state maximize the effectiveness of its expenditure of federal highway-safety funds, it is arguably related to the relevant federal interest of increasing highway safety.

But the privilege afforded by § 409, as amended – as interpreted by the Washington Supreme Court – goes farther than this. It ensures, recall, not merely that a locality that develops an application for a share of its

state's federal safety-improvement funds will be *no more* susceptible to successful damage suits as a result of having sought the federal funding than if it had not, but that it will be substantially *less* susceptible to such suits. The broad privilege that the Washington Supreme Court read § 409, as amended, to afford thus *reduces* one of the incentives that operate to encourage state and local governments improve the safety of their highways: the threat of tort liability.

Furthermore, the broad reading of § 409 provides no countervailing increase in highway safety. After all, so long as a locality is made no more susceptible to damage suits by applying for federal funding, then it should be fully incentivized to do so by the prospect that a successful application would result in its own roads being made safer – a consequence that would itself reduce the locality's potential exposure in tort by reducing the number and seriousness of accidents.

In sum, then, to the extent that the § 409 privilege extends to documents and data that would have existed in the absence of the federal funding scheme, and that would not have been privileged in the absence of § 409, it diminishes the ability of individuals to successfully sue the state or its political subdivisions for hazardous road conditions, relative to the state of affairs that would exist if the § 409 privilege did not extend so far. This diminished likelihood of success means that the states will face a reduced incentive to devote their *own* funds to increasing highway safety as a means of precluding such potentially costly suits. At the same time, extending the privilege to these original documents – as distinct from a compilation of them, or a report summarizing them – does not enable the state to spend its allotment of *federal* highway-safety funds more effectively or efficiently.

That is, the state receives and spends the same amount of federal highway-safety funds, and spends those funds in exactly the same way, as it would have if the privilege did not extend to materials and data that would have existed and have been discoverable in the absence of the federal funding scheme. Thus, by extending the privilege this far, Congress clearly diminished – perhaps into non-existence – one important force for increased highway safety within the state while providing no countervailing increase in highway safety relative to the level that would have been obtained with a narrower § 409 privilege. The net result will be a certain decrease in highway safety, per state and thus nationally. Such an outcome is obviously antithetical to – and therefore not appropriately "related to" – the federal interest in *increased* highway safety at the center of the federal funding scheme of which § 409, as amended, is a part.

II. 23 U.S.C. § 409, as amended, exceeds Congress's power under the Commerce Clause

No matter how this Court ultimately resolves the various ambiguities in § 409, as amended, discussed above, enactment of that provision was not within Congress's power under the Commerce Clause.

With its decision in *United States v. Lopez*, 514 U.S. 549, 558 (1995), this Court made clear that there are only "three broad categories of activity that Congress may regulate under its commerce power." And only one of those categories is even potentially relevant with regard to § 409, as amended, which, under the interpretation most favorable to Congress, seeks to regulate the rules of evidence to be applied in state court civil proceedings involving causes of action brought solely under state law.

Under *Lopez*, "Congress may regulate the use of the channels of interstate commerce," 514 U.S. at 558.

Congress also "is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," *id.* Section 409 in its pertinent part, however, does not seek to regulate in either of these permissible areas. Rather, it seeks to regulate the rules of evidence to be applied in state court civil proceedings involving causes of action brought solely under state law.

In addition, the *Lopez* Court held that "Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce," *id.* at 558-59. The Court elaborated on this test: "[w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained," *id.* at 560 (emphasis added); *United States v. Morrison*, 529 U.S. 598, 611 (2000) ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

Thus, in order for the Court to find that § 409, as amended, is authorized by this aspect of the *Lopez* test, this Court would need to hold that litigation of state court civil proceedings involving causes of action brought solely under state law is an "economic activity" that "substantially affects interstate commerce," *id.* at 560. It is noteworthy in this regard, that the scant legislative history of § 409, as amended, contains no congressional findings on this issue. *See id.* at 563 (stating that the existence of such findings may enable the Court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye"); *Morrison*, 529 U.S. at 612 (same).

Further, although one might contend that *some* civil litigation for money damages is, under certain circumstances, "economic activity," it is far less clear that *all* such civil litigation in state court involving causes of action brought solely under state law is "economic activity" that "substantially affects interstate commerce," *id.* at 560. There is no obvious principled basis on which this Court could distinguish the state court litigation covered by § 409 from all other state court civil litigation for money damages. Thus, in order to find that § 409 is within Congress's Article I commerce power, this Court must be willing to hold that *all* civil litigation for money damages in state court involving causes of action brought solely under state law is "economic activity" that "substantially affects interstate commerce," *id.* at 560.

To so hold, would require this Court to "pile inference upon inference" with the effect of eradicating any "distinction between what is truly national and what is truly local," *id.* at 567-68. This Court wisely declined to head down this path in *Lopez*, *id.* at 567-68, and, later, *Morrison*, 529 U.S. at 615-19, and has no reason to change course here.

Such a change of course would be particularly troubling here because it would seemingly eradicate any limitation on federal power in regulating state court judicial proceedings involving causes of action brought solely under state law. This Court has clearly held that Congress may regulate state court procedure with regard to *federal* causes of action brought in state court, *see,* e.g., *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361 (1952); *Felder v. Casey*, 487 U.S. 131, 138 (1988). This Court has also repeatedly observed, however, that

> we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion."

Patterson v. New York, 432 U.S. 197, 201 (1977), quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Felder*, 487 U.S. at 138 ("No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts."). Further, this Court in *Lopez* cautioned that it is particularly important for limitations on federal power to be maintained "in areas . . . where States historically have been sovereign," 514 U.S. at 564.

For this Court to hold that *all* civil litigation in state court involving causes of action brought solely under state law is "economic activity" that "substantially affects interstate commerce," *id.* at 560, would effectively sanction intolerably broad federal regulatory power over this core locus of traditional state sovereignty.

III. 23 U.S.C. § 409, as amended, is an unconstitutional intrusion upon state sovereignty

Opponents of states' rights who are nonetheless eager to protect individual rights often fail to understand or acknowledge that our Constitution protects states' rights solely in order to protect individual rights. As this Court has repeatedly observed,

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or

> even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

New York v. United States, 505 U.S. 144, 181 (1992) quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also Lopez*, 514 U.S. at 576 (Kennedy, J., concurring); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'.") (quoting *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)); *Morrison*, 529 U.S. at 616 n.6.

It is precisely because the protection of states' rights is not an end unto itself that the states do not have the power to authorize otherwise-unconstitutional encroachments upon state sovereignty:

> Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the branches of the Federal Government clarifies this point. The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.

New York, 505 U.S. at 182; *see also* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 129 (2001) (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Myers v. United States*, 272 U.S. 52 (1926), in which the Court invalidated

legislation that limited the President's authority with regard to certain appointments, even though the President signed the legislation, because the legislation unconstitutionally "infringed on Presidential authority").

This concern with the role of state autonomy in protecting the rights of individuals is what has caused this Court repeatedly to emphasize the important role of federalism in ensuring that both state and federal officials remain accountable to the people. *See New York*, 505 U.S. at 168; *Printz v. United States*, 521 U.S. 898, 920 (1997); *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring). "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Tile Ins. Co.*, 504 U.S. 621, 636 (1992).

It is therefore important to understand that this case is fundamentally about obscuring political responsibility at the expense of individuals' rights under state law.

Consider again the example of Washington State. Prior to Congress's enactment of § 409 in 1987, the state had waived its sovereign immunity with regard to tort claims brought against the state, and no state law privilege existed with regard to the types of materials and data later protected by § 409. This strongly suggests that the people of Washington wanted a tort system under which individuals could bring suit against the state "for damage arising out of its tortious conduct to the same extent as if it were a private person or corporation." Wash. Sess. Laws 1961, ch. 136. Presumably the people of Washington appreciated that this potential tort liability would both provide the state an important incentive to prevent or mitigate conditions that might render the state liable, and ensure that those wrongfully injured by the state would receive just compensation.

During this period, nothing other than the perceived preference of Washington voters presumably precluded

Washington legislators from enacting an exception to the existing waiver of sovereign immunity that would have had the same import as § 409. Similarly, the Washington legislature was free to take appropriate measures to create an evidentiary privilege in state court proceedings identical to that created by § 409. The fact that Washington legislators did neither of these things suggests that they judged that their political fortunes would not be enhanced by such legislation. It also strongly suggests that they (or the people of Washington) did not believe such enactments were likely to increase highway safety within the state of Washington.

With the enactment of § 409 and its amendment, however, Congress was able to blur "the boundaries between the spheres of federal and state authority" such that "political responsibility would become illusory," *Lopez*, 514 U.S. at 577. The Washington legislature could now claim that Congress had put it to a terrible dilemma of abiding by the presumably unpopular § 409 privilege or losing 100% of its annual allotment of federal highway safety funds. At the same time, Washington's representatives in Congress could avoid responsibility by claiming that the federal legislation left to the state legislature the final decision of whether to accept the federal funds given the condition imposed by § 409.

Because of this tendency of conditional offers of federal funds to the states to diminish political accountability by blurring the boundaries between federal and state authority, this Court must be vigilant in its review of such legislation. Here, for example, there is simply nothing to recommend the condition on federal funds imposed by § 409, as amended. The condition does not further, and is indeed antithetical to, the federal interest at stake. The condition interferes in an area long understood to be integral to state sovereignty. And the condition is one whose enactment the Washington legislature – and any

other state legislature – could have independently sought as a matter of state law at any time between the enactment of the Federal Highway Safety Act of 1966 and the adoption of § 409 in 1987.

One is therefore left with the uneasy feeling that the primary accomplishment of § 409, as amended, was to obscure political responsibility for imposing on the people of the states a drastic change in state law of which they were known not to approve, and that would sacrifice existing individual rights under state tort and criminal law.

CONCLUSION

Today, the spending power stands as the great gap in this Court's "federalist revival," a gap with the undisputed potential to nullify our Constitution's critical "distinction between what is truly national and what is truly local," *Lopez*, 514 U.S. at 567-68. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1920 (1995) (observing that if the Spending Clause is "interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of 'a federal government of enumerated powers' will have no meaning"); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195, 195 (2001) ("The greatest threat to state autonomy is, and has long been, Congress's spending power.").

Notwithstanding this Court's careful delineation in *Dole* of the requirements that must be met for conditional offers of federal funds to the states to pass constitutional muster, the *Dole* doctrine is generally perceived as having no bite. *See, e.g.*, Richard A. Epstein, *Bargaining with the State* 156-57 (1993) (contending with regard to *Dole* that "any constitutional challenges to the conditions attached to federal grants are hopeless under the current law," and describing "the basic pattern of the [post-*Dole*] cases" as

"clear and inexorable"); William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303, 319 (1993) (observing that *Dole* "evidently puts federalism under the discretion of Congress"). This conclusion is not unwarranted in light of this Court's failure ever to hold that a conditional offer of federal funds to the states did not survive scrutiny under *Dole*.

As the above analysis demonstrates, § 409, as amended, cannot survive scrutiny under *Dole*. Further, it does not fall within the scope of Congress's power under the Commerce Clause, nor is it consistent with the concern for political accountability that underlies much of this Court's recent federalism jurisprudence.

Thus, this case provides this Court an exceedingly appropriate opportunity – that it may not again soon have – to make clear that the spending power does not provide Congress an eternally available means of circumventing those limitations on Congress's other Article I powers that this Court has recognized and that the Framers of our Constitution intended.

The import of this case is potentially as great as that of this Court's extraordinarily important decision in *Lopez*. For while *Lopez* signaled that the "federalist revival" would begin in earnest, the invalidation of § 409, as amended, would significantly narrow the one remaining – and potentially eviscerative – "loophole" in this Court's important project of restoring a meaningful balance between the state and federal spheres.

Respectfully submitted,

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